Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
General Motors Corporation Hughes Electronics Corp., Transferors	)	
	)	MB Docket No. 03-124
And	)	
	)	
The News Corporation Limited, Transferee	)	
	)	
For Authority to Transfer Control	)	

REPLY COMMENTS

American Cable Association

I. INTRODUCTION AND SUMMARY

ACA's *Opposition*[1] sets forth ample basis for the Commission to deny the *Petition*[2] and to continue to enforce the conditions governing transactions with News Corp.-affiliated RSNs and broadcast stations for their full term.[3] The record in this proceeding corroborates ACA's *Opposition* and provides additional grounds for denying

[1] *In the Matter of General Motors Corporation and Hughes Electronics Corporation, Transferors, and The News Corporation Limited, Transferee, For Authority to Transfer Control*, News Corp. Petition for Modification of Conditions, MB Docket 03-124, Opposition of the American Cable Association (filed May 1, 2008) ("*Opposition*").

[2] *In the Matter of General Motors Corporation and Hughes Electronics Corporation, Transferors, and The News Corporation Limited, Transferee, For Authority to Transfer Control*, MB Docket 03-124, News Corp. Petition for Modification of Conditions (filed Mar. 11, 2008) ("*News Corp. Petition*").

[3] *In the Matter of General Motors Corporation and Hughes Electronic Corporation, Transferors, and The News Corporation Limited, Transferee, For Authority to Transfer Control*, Memorandum Opinion and Order, 19 FCC Rcd. 473, ¶¶ 172-179 (2004) (imposing conditions on RSN transactions), ¶¶ 218-226 (imposing conditions on retransmission consent transactions), ¶¶ 176, 220 (imposing conditions on transactions with small and medium-sized cable operators) ("*News Corp. Order*").

the *Petition*, particularly as the News Corp. conditions apply to small and medium-sized cable companies.

With these Reply Comments, we also place on the record News Corp.'s very recent reports of record financial performance by its broadcast and cable networks. These public statements eliminate any shred of credibility to the *Petition's* claims that News Corp. would somehow suffer from a "competitive disadvantage" if the conditions were not terminated early.

These Reply Comments do not address comments in support of the Petition. <u>None were filed</u>.

On this record, the *Petition* must fail.

The American Cable Association. ACA represents nearly 1,100 independent cable businesses serving 7.5 million cable subscribers primarily in smaller markets and rural areas. ACA member systems are located in all 50 states and in virtually every congressional district. ACA members range from family-run cable businesses serving a single town to multiple system operators that focus on smaller systems and smaller markets. About half of ACA's members serve less than 1,000 subscribers. All ACA members face the challenges of building, operating, and upgrading broadband networks in lower density markets.

ACA members share a vital interest in this proceeding. ACA members report that the News Corp. conditions have brought a measure of stability to Fox-affiliated retransmission consent and RSN renewals. This has benefited consumers by maintaining access to "must have" programming and avoiding disruption of customer viewing patterns. Withdrawal of these conditions place small and medium-sized cable companies and the consumers they serve at serious risk.

II. THE RECORD UNEQUIVOCALLY SUPPORTS DENIAL OF THE *PETITION*.

As set forth in ACA's *Opposition*, the Commission must deny the *Petition* for at least two principal reasons. First, the *Petition* shows how News Corp. has blatantly manipulated Commission processes to suppress scrutiny of an issue of decisional significance. While trying to get its deal approved, News Corp. maintained that the News Corp. conditions were scheduled to remain effective through 2010, and that any consideration of removing the conditions was "irrelevant" and a "waste of Commission resources."[4] Less than two weeks after the Commission consented to the transaction, News Corp. changed its story and sought removal of conditions. This manipulation of Commission processes and lack of candor provide solid grounds to deny the *Petition*.[5]

Second, the conditions continue to have substantial public interest benefits, especially for consumers served by small and medium-sized cable systems. The conditions ensure continued access to "must have" local Fox broadcast and RSN programming and constrain the disruption of customer viewing patterns and competitive harm that would result from Fox's temporary withdrawal of that programming.[6] The

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[4] *In the Matter of News Corporation and The DirecTV Group, Inc., Transferors, and Liberty Media Corporation, Transferee, For Authority to Transfer Control*, MB Docket 07-18, Reply Comments of the News Corporation at 15 (filed Apr. 9, 2007).

[5] Commission regulations require applicants to update the Commission on matters of decisional significance in a Commission proceeding involving a pending application. 47 C.F.R. § 1.65(a). News Corp. failed to meet this obligation by concealing from the Commission and interested parties that News Corp. planned to seek modification of the conditions within days of closing the Liberty transaction. *See Opposition* at 2-4.

[6] *News Corp. Order*, ¶ 161 ("[T]he primary public interest harm that is likely to flow from the combination of RSN programming and nationwide MVPD distribution assets is the competitive harm of across-the-board price increases to MVPDs for carriage of News Corp. RSNs and/or other carriage concessions. . . .

Petition presents no evidence of countervailing harm to retaining the conditions. The substantial and ongoing public interest benefits of the conditions warrant denial of the *Petition*.

The record corroborates ACA's *Opposition* and provides additional evidence of the substantial public interest benefits resulting from maintaining the conditions for their full term.

The record includes the *Opposition of The National Cable Television Cooperative*,[7] the only organization fulfilling the role of small cable company bargaining agent under the News Corp. conditions. NCTC describes how early termination of the conditions would disrupt ongoing negotiations and arbitrations undertaken on behalf of small cable companies:

> It would violate the letter and spirit of these conditions – and be patently unfair and contrary to the public interest – [for] News Corp. to walk away from or otherwise fail to comply with the terms of conditions with respect to any arbitration proceeding or negotiation commenced prior to such divestiture.[8]

NCTC further explains how early termination of the conditions would especially harm small cable companies and the many rural consumers they serve:

> The premature expiration of the conditions would be especially problematic for smaller cable companies that chose to negotiate and/or arbitrate through a bargaining agent such as NCTC since. . . such

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[A]lso the transaction would result in secondary public interest harms by depriving subscribers of access to RSN programming during the period of temporary foreclosure or by causing subscribers to change MVPDs to access the foreclosed programming. . . .").

[7] *In the Matter of General Motors Corporation and Hughes Electronics Corporation, Transferors, and The News Corporation Limited, Transferee, For Authority to Transfer Control*, News Corp. Petition for Modification of Conditions, MB Docket 03-124, Opposition of the National Cable Television Cooperative (filed May 1, 2008) ("*NCTC Opposition*").

[8] *NCTC Opposition* at 5.

> companies are least able to afford to act individually and are most susceptible to pressure from a company with the size and resources of News Corp. Moreover, since it is only by virtue of the RSN condition that these cable operators are currently entitled to carry these RSNs (pursuant to the "standstill" element of the conditions. . .), terminating the condition as to these pending proceedings would harm the public by causing an immediate loss of access to RSN programming.[9]

These are precisely the harms to consumers and competition identified by the Commission in imposing the conditions, and in adopting additional conditions for small and medium-sized cable companies "at particular risk of temporary foreclosure strategies."[10] Like ACA, NCTC concludes that the public interest would be best served by maintaining the conditions for their full term.[11]

Similarly, the *Opposition of Dish Network* describes the public interest benefits of maintaining the conditions for their full term:

> [The] conditions are pro-competitive and pro-consumer. The requirement that carriage disputes over News Corp. – owned broadcast stations and regional sports networks ("RSNs") are subject to neutral third-party arbitration has proven to be sound regulatory policy, which should be extended and expanded, not truncated as requested here.
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> * * *
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> The conditions' arbitration requirement is a market-based solution that has worked well and has served the public interest. . . . In its Petition, News Corp. neither rebuts these findings, nor provides any evidence it has not worked as intended.[12]

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[9] *Id.* at 6.

[10] *News Corp. Order*, ¶ 176 ("[W]e agree with ACA to the extent that it argues that small and medium-sized MVPDs may be at particular risk of temporary foreclosure strategies aimed at securing supra-competitive programming rate increases for "must have" programming such as RSNs. . . .").

[11] *NCTC Opposition* at 8.

[12] *Dish Network Opposition* at 1-2 (citations omitted).

As shown, NCTC and Dish Network corroborate ACA's description of the important public interest benefits resulting from maintaining the News Corp. conditions for their full term.

Beyond that, both Dish Network and NCTC provide cogent explanations of additional grounds for maintaining the conditions. Dish Network describes how maintaining the conditions is warranted in light of continuing overlap of News Corp.'s interests with Liberty's:

> [T]here has not been a clean break between News Corp., Liberty Media, and DIRECTV with respect to [RSNs]. Specifically, Liberty Media now operates FSN Northwest, FSN Pittsburgh, and FSN Rocky Mountain networks. All three networks, however, remain affiliated with News Corp.'s Fox Sports Net. . . . <u>These continuing ties – which effectively maintain the status quo of a vertically integrated conglomerate – highlight the extent to which the two companies' operations are still entwined, and their collective interests remain aligned</u>. News Corp. has not established that it no longer has a continued business relationship with Liberty Media with respect to the management, operations, and carriage of RSNs.[13]

In the same vein, NCTC explains how maintaining the conditions is necessary to prevent discriminatory conduct against smaller MVPDs in light of pre-divestiture programming and retransmission consent deals with DirecTV:

> Continued application of the RSN and RTC conditions in the circumstances described is necessary. . . to ensure that any favoritism shown by News Corp. to DIRECTV in transactions conducted while they were vertically-integrated is not perpetuated in new agreements with other MVPDs. Even though it is no longer affiliated with DIRECTV, News Corp. has an incentive to "make up" for any price breaks it gave DIRECTV by demanding discriminatory or unfair terms and conditions from other MVPDs.[14]

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[13] *Id.* at 3 (citations omitted) (emphasis added).

[14] *NCTC Opposition* at 8.

On these points, ACA concurs with and supports the factual statements and thoughtful analyses of both NCTC and Dish Network.

In summary, the record firmly establishes the public interest benefits of maintaining the conditions for their full term. As for comments in support of the *Petition*? The record contains none. In short, the response to the *Petition* is unanimous - it must be denied.

III. NEWS CORP.'S RECENT REPORTS OF "BIG GAINS" FROM ITS CABLE AND BROADCAST NETWORKS BELIE THE *PETITION'S* CLAIMS OF "COMPETITIVE DISADVANTAGE."

The *Petition* pleads that the retention of the News Corp. conditions would harm the public interest by placing News Corp. at a "competitive disadvantage" in negotiating with MVPDs and in the programming marketplace.[15] The definitive rebuttal to this argument comes from. . . News Corp. itself.

Shortly after claiming "competitive disadvantage" in the *Petition*, News Corp. touted its "big gains" from its cable and broadcast networks.[16] Notwithstanding the News Corp*.* conditions, News Corp. reported record revenue and income, driven in part by cable and broadcast programming.[17] For the quarter ending March 31, 2008, News Corp. reported that net income tripled, *from $871 million to $2.7 billion* and its operating

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[15] *News Corp. Petition* at 7 ("Retention of the RSN and RTC Conditions would harm the public interest because it would place News Corp. and its popular programming services at a competitive disadvantage in negotiating with MVPDs and in competing with other programming networks for the acquisition of video content.").

[16] Mike Farrell, *Cable, Broadcast Drive News Corp. Results*, MULTICHANNEL NEWS, May 7, 2008 ("News Corp. reported 16% revenue and operating income growth. . . . Big gains at its Fox Broadcasting Network and its cable networks helped fuel the quarter.").

[17] *See* Press Release, News Corp., News Corp. Reports Third Quarter Operating Income of $1.4 Billion; Growth of 16% Over Third Quarter a Year Ago, *available at* http://www.newscorp.com/investor/earnings_releases_index.html (last viewed May 15, 2008).

income increased 16% to $1.4 billion.[18] Revenue from cable network programming increased to $330 million in the quarter as "increased contributions from the Regional Sports Networks. . . . [from] increased rates and additional subscribers" drove an increase of 20% in operating income.[19] Similarly, News Corp. reported that Fox Broadcasting enjoyed increased operating income of a healthy 53% to $419 million.[20]

Amidst this impressive story of another record financial performance by News Corp., nowhere does the company or its executives express concern about the "competitive disadvantage" threatening the company. Only in the *Petition* does News Corp. bemoan that.

From News Corp.'s own press releases and financial reports, the Commission can readily conclude the *Petition's* claim of "public interest harm due to competitive disadvantage" lacks any basis in fact. Consequently, as pointed out by NCTC and Dish Network,[21] the *Petition* utterly fails to establish that the public interest requires early termination of the conditions. The Commission must reject it.

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[18] *Id.* at 1-2.

[19] *Id.* At 3-4 (emphasis added) (Moreover, consolidated operating income from cable network programming totaled $956 million for the 9 month period ending March 31, 2008.).

[20] *Id.* at 3.

[21] *NCTC Opposition* at 4; *Dish Network Opposition* at 2.

IV. CONCLUSION

The record shows unanimous support for denial of the *Petition*. The News Corp. conditions continue to have substantial public interest benefits, and News Corp. has failed to show any countervailing harm. The Commission must deny the *Petition* and maintain the conditions on News Corp.-affiliated broadcast stations and RSNs at least through 2010.

Respectfully submitted,

AMERICAN CABLE ASSOCIATION

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